United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7367

ORIGINAL

To be argued by
DIANE R. EISNER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7367

ROBERT P. KOCH, KEVIN P. RYAN, JOHN J. WILSON, Captains of Police, PHILIP BOHRER, JAMES L. JUDGE, WILLIAM WIESE, Lieutenants of Police, RICHARD BECK, JOSEPH BIRBIGLIA, CHARLES CASEY, JAMES CLARK, EDWARD EASTWOOD, JOHN GALANTINI, RONALD GOULDNER, REGINALD GREENIDGE, RUSSLAN HOSSMAN, JAMES KEELS, JOHN MURRAY, LAWRENCE PALLADINO, Sergeants of Police, New York City Transit Authority,

Plaintiffs-Appellants,

-against-

DAVID L. YUNICH, Chairman and Chief Executive Officer, New York City Transit Authority, and ALPHONSE E. D'AMBROSE, Personnel Director and Chairman of the Civil Service Commission, City of New York.

Defendants-Appellees.

BRIEF OF APPELLEE D'AMBROSE

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Defendants-Appellees.

BRIEF OF APPELLEE D'AMBROSE

Statement

This is an appeal from an order of the District Court for the Eastern District of New York (BRUCHHAUSEN, D.J.), entered on June 20, 1975, which dismissed plaintiffs-appellants' complaint.

Questions Presented

1. Did the District Court properly refuse to convene a three-judge court to consider appellants'

challenge to sections 80 and 85 of the Civil Service Law of the State of New York?

2. Was the complaint properly dismissed?

Facts

The plaintiffs-appellants (hereinafter appellants) are members of the New York City Transit Authority Police Department (2,5).* Pursuant to a directive from the Personnel Director and Chairman of the Civil Service Commission of the City of New York, a "lay-off" list was compiled by the Transit Authority setting forth the names of Transit Authority police officers to be demoted in the event of a budget cut (6). The list was promulgated in accordance with sections 80 and 85 of the Civil Service Law of the State of New York, which provide, in part, for demotion in the "inverse order of original appointment on a permanent basis in the classified service...." For this purpose, non-disabled veterans have their date of original appointment deemed thirty months earlier than the actual date; and disabled veterans, sixty months earlier.

Appellants bring this action under 42 U.S.C. § 1983, alleging that this system, whereby they are

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*Unless otherwise indicated, numbers in parentheses refer to the pages of the Joint Appendix on Appeal.

threatened with demotion, constitutes a deprivation of equal protection and due process of law, and impairs existing contract rights in violation of Article I, section 10 of the United States Constitution (17-18).

The complaint prays for, inter alia, the convening of a three-judge court, pursuant to 28 U.S.C. §§ 2281 and 2284, to determine the constitutionality of sections 80 and 85 of the Civil Service Law (3,18). It also requests preliminary and permanent injunctive relief (18-19).

The District Court, by order entered June 20, 1975, dismissed the complaint (24).*

* By order to show cause dated June 27, 1975, one week after entry of the order here appealed from, plaintiff commenced an Article 78 proceeding in the New York Supreme Court, Kings County (Index No.), wherein plaintiffs sought relief on essentially the same grounds as are asserted in their federal complaint. In an opinion published in the New York Law Journal on October 1, 1975 (p. 10, cols. 5-6) that Court (Rubin, J.) held that the petition should be dismissed. On October 17, 1975 a judgment dismissing the petition was entered. A notice of appeal to the Appellate Division has been served.

Defendants in this federal action have not as yet filed an answer, but should they be required to do so it can be anticipated that they will plead as an affirmative defense that by submitting their claims to the state court without sufficiently preserving their federal constitutional claims, cf. England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1963), plaintiffs have caused the state determination to have res judicata effect, barring further assertion in this federal action of their federal claims.

ARGUMENT

THE CONSTITUTIONAL QUESTIONS RAISED IN THE COMPLAINT ARE WHOLLY INSUBSTANTIAL AND DO NOT WARRANT DETERMINATION BY A THREE-JUDGE COURT.

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT.

Appellants claim that they have been denied substantive and procedural due process and equal protection, in violation of the Fourteenth Amendment, and that their contract rights have been impaired, in violation of Article I, section 10, of the United States Constitution. Under none of these do they state a cause of action.

(1)

Appellants first allege that any demotion that may affect them, through the implementation of a demotion scheme formulated pursuant to Civil Service Law sections 80 and 85, is an arbitrary deprivation of their property interests in continued employment with the Transit Authority. The theory advanced in support of this proposition is based, first, upon section 6 of Article 5 of the New York State Constitution, which provides that public employment shall be based upon "merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive."

The demotion scheme in Civil Service Law section 80, which provides for demotion in the "inverse order of original appointment in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs," results in favoring tenure in a department over tenure in a position. Those who, through promotional examinations, have risen rapidly through the ranks, will be demoted from their current position before one who attained the higher rank at a subsequent date but who has been on the department payroll for a greater overall period. It is contended that this policy is violative of the "merit and fitness" criteria of the state constitution and goes to the expectancy of a property interest that those criteria set up.

The second prong of appellants' "property" claim is based upon the fact that the state constitution grants additional credit to veterans to be used on either original entrance or promotional examinations, but limits the application of such additional credits to one instance, no matter how many examinations are taken. Appellants claim that section 85 of the Civil Service Law, which sets the date of original employment for veterans back thirty or sixty months, in effect granting veterans greater retention rights in their position, is violative of the state constitutional restriction on the application of addi-

tional veterans' credits to one instance, and unconstitutionally reduces appellants' seniority, thus placing them in greater jeopardy of demotion.

Appellants' allegations do not state a cause of action for deprivation of a property interest as that term has been interpreted by the Supreme Court. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court defined property interests as being "created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and support claims of entitlement to those benefits." 408 U.S. at 577.

The formation of the New York City Transit Authority is authorized by Title 9 of the Public Authorities Law of the State of New York. (McKinney's Consol. L., Bk. 42, secs. 1200 - 1221, 1970). Section 1210 (2) of that law provides in part:

> "The appointment, promotion and continuance of employment of all employees of the authority shall be governed by the provisions of the civil service law and the rules of the municipal civil service commission of the city." (Emphasis added.)

Clearly, appellants' claims of entitlement to retention rights superior to those granted preference by virtue of sections 80 and 85 of the Civil

Service Law are not supported by section 1210 (2), the source from which they derive their property interest. That section specifically defines that interest as being limited by the provisions of the Civil Service Law.

In Arnett v. Kennedy, 416 U.S. 134 (1974), a federal civil service employee working for OEO was removed pursuant to the Lloyd-La Follette Act which provided that employees could only be removed for "cause" and further described the procedural mechanism for determining cause. The Act did not provide for a pretermination, trial-type adversary hearing. A three-judge court found that these procedures constituted a denial of due process. The Supreme Court reversed. The plurality opinion stated (416 U.S. at 151):

> "The District Court, in its ruling on appellees' procedural contentions, in effect held that the Fifth Amendment to the United States Constitution prohibited Congress, in the Lloyd-La-Follette Act, from granting protection against removal without cause and at the same time -- indeed, in the same sentence -- specifying that the determination of cause should be without the full panoply of rights which attend a trial-type adversary hearing. We do not believe that the Constitution so limits Congress in the manner in which benefits may be extended to federal employees."

The plurality went on to say (15[illegible]55):

> "[W]e decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its en-

> forcement ****
> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet ****
> Here the property interest which appellee had in his employent was itself conditioned by the procedural limitations which had accompanied the grant of that interest."

In the instant case, the property interest claimed by appellants is itself conditioned on the very provisions of the Civil Service Law which appellants claim adversely affect those rights. Clearly, appellants could have no "reasonable expectation" of retention rights greater than those "defined by the terms of their appointment." See Board of Regents v. Roth, 408 U.S. at 578.

The formation of a special division of detectives, authorized by section 1204 (16) of the Public Authorities Law (see Brief, pp. 11, 13), likewise impairs no interest of appellants. Both this section, and the additional retention rights of veterans, have been upheld by the Court of Appeals of the State of New York as not violative of any constitutional employment scheme (see Hagan v. Murphy, 14 NY 2d 701 (1964); Wolf v. Delaney, 266 N.Y. 262 (1935), and therefore these provisions must be read to define rather than impair appellants' existing property rights.

Appellants' demand for a pretermination hearing, before they may be deprived of salary or pension rights is baseless. The demotions, if they occur, will be effectuated in conformity with sections 80 and 85 of the Civil Service Law. Notwithstanding appellants' failure to establish a property right, there is no element of discretion involved in actions taken pursuant to these sections and a hearing would serve no useful purpose.

(2)

Appellants' claim that a demotion, with its subsequent effect on their pensions, constitutes an unconstitutional impairment of contract rights under Article I, section 10 of the United States Constitution, is unsupportable. The fact that the state deems membership in a retirement system to be a contractual obligation which "shall not be diminished or impaired" has no bearing on the instant case where the conditions precedent to the vesting of the interest have not been met. Appellants place the cart before the horse in maintaining that membership in a retirement system guarantees them their position in government employ. Under this view, a government could not even constitutionally remove an employee for cause if he was a member of a retirement system. Such a theory is patently meritless. See Robbins v. Police Pension Fund, 321 F. Supp. 93 (S.D.N.Y. 1970).

(3)

Appellants' final claim, that of a denial of equal protection, is specious. To state a claim under 42 U.S.C. § 1983 the complaint must allege specific facts upon which the claim of discrimination is based and not mere conclusory allegations. Powell v. Workmen's Compensation Board of the State of New York, 327 F. 2d 131 (2d Cir. 1964); Pugliano v. Staziak, 231 F. Supp. 347, 349 (W.D. Pa., 1964), affd. 345 F. 2d 797 (3rd Cir. 1965).

Not only have appellants produced no statistics in support of their claim that the termination procedures formulated by appellees have "produced an adverse impact upon employees of black and minority groups greater than upon other employees" (15), but by the terms of their complaint, they have negated these very claims. Paragraph "Eighteenth" of appellants' complaint alleges (15):

> "One-third of the plaintiff Sergeants are black and members of a minority group. Upon information and belief, blacks and other minority groups constitute approximately 31 percent of the employees under the authority of the defendant New York City Personnel Director ****"

If these figures are accurate, the minority officers affected by the proposed demotions are in almost perfect proporation to the total member of minority officers so employed. In no sense have appellants

indicated that members of minority groups will be disproportionately affected by the proposed demotions. Moreover, even if appellants had demonstrated such an effect, the complaint is barren of allegations that the Transit Authority had previously engaged in discriminatory hiring practices or that the facially neutral demotion scheme lacks a rational basis. Clearly, appellants have failed to state a cause of action under the Civil Rights Act.

(4)

Although plaintiffs do not brief this issue, some discussion of their request for the convening of a three-judge court is called for.

It is well settled that a statutory three-judge court should not be convened where no substantial federal constitutional question is presented. Ex Parte Poresky, 290 U.S. 30 (1933); Water Service Co. v. Redding, 304 U.S. 252 (1938); Bailey v. Patterson, 369 U.S. 31 (1962); Goosby v. Osser, 409 U.S. 512 (1973). "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from previous decisions of this Court so as to foreclose the subject." Water Service Co., supra, at p. 255. See, also, Pordum v. Board of Regents, 491 F. 2d 1281 (2d Cir. 1974).

This Circuit has determined that the best course to follow where there is a demand for a three-judge court is for single district judges to continue conscientiously to pass upon the substantiality of constitutional attacks on state statutes. Heaney v. Allen, 425 F. 2d 869 (2d Cir. 1970); Johnson v. New York State Education Dept., 449 F. 2d 871 (2d Cir. 1971), cert. granted 405 U.S. 916 (1972), remanded on other grounds 409 U.S. 75 (1972).

In the instant case, the District Court properly found the constitutional claims to be wholly insubstantial and improper for presentation to a three-judge court. The court likewise did not err in dismissing the complaint, no cause of action having been stated.

CONCLUSION

The order appealed from should be affirmed, with costs.

November 6, 1975

Respectfully submitted,

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L. KEVIN SHERIDAN
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AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

JAMES BURNS

being duly sworn, says, that on the 6th day of Nov., 19 75

at No. 60 East 42nd in the Borough of in The City of New York, he served three copies

of the annexed Brief of Appellee (Morton) upon Frederick J. Lind Esq.,

the attorney for the in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Sworn to before me, this 6
day of Nov, 19 75

James Burns

Carlos M. Rodriguez
Carlos M. Rodriguez
Commissioner of Deeds
City of N.Y. 2-603
Expires Oct 1 1977